No. 22233

United States
COURT OF APPEALS
for the Ninth Circuit

STATE OF OREGON, by and through its State Highway Commission, composed of Glenn L. Jackson, Kenneth N. Fridley and David B. Simpson,

Appellant,

v.

Tug GO GETTER, et al, including OLSON TOWBOAT CO., a California corporation,

Appellee.

APPELLANT'S REPLY BRIEF

Appeal from the United States District Court for the District of Oregon

HONORABLE GUS J. SOLOMON, District Judge

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By way of reply:

Since the motion to dissolve the writ of foreign attachment was presented to the District Court wholly upon affidavits this Court may review the facts free of the impact of the clearly erroneous rule, *Mo-*

bil Tankers Company v. *Mene Grande Oil Company* (3 Cir. 1966) 363 F.2d 611.

NOT FOUND—corporate presence

Upon the threshhold of its motion to vacate the writ Olson Towboat was required to prove that it had actually done business in Oregon to some substantial degree and in some systematic manner. It did not.

The two supporting affidavits of Olson and Miller (Tr. 26) were illusory. They did not state that Olson Towboat had ever had its tugs repaired, or had ever ordered fuel or had ever hired crews in Oregon but, instead, merely stated that Thomas E. Miller (the Oliver J. Olson & Co. manager) was employed as a managing agent whose duties were "transacting whatever shoreside business is necessary in the Coos Bay area." This oblique approach is interesting because Olson Towboat seeks to excuse its failure to have appointed an agent in Oregon to receive process upon the basis that it was strictly engaged in interstate commerce (Appellee Br. 12). Obviously, had Olson Towboat ever put its vessels in an Oregon shipyard or had made local purchases it would have fallen from its interstate "tight rope."

What renders these supporting affidavits totally inadequate are their loud silence in respect to how many vessels this San Francisco tugboat company operated and how frequently, if at all, they entered Oregon waters. Failure to state such obvious inter-

state activity justifies the suspicion that only Oliver J. Olson & Co. and not Olson Towboat was doing business in Oregon.

Indicia of doing business, such as maintaining a telephone listing, or a bank account and the like are most often employed when the shoe is on the other foot and an outsider is trying to show that a foreign corporation is doing business in a district. When, as here, a foreign corporation has the power to state directly and precisely what business it has conducted in a district a court as a matter of law should not regard as sufficient a statement that an agent exists to do whatever business is necessary and leave to conjecture that which in fact was done. It is axiomatic in admiralty and established statutory law in Oregon, ORS 17.250 (6) (7), that evidence is to be estimated according to that which a party has the power to produce and that if weaker and less satisfactory evidence is offered when stronger and more satisfactory evidence is within the power of the party to produce the evidence offered should be viewed with distrust.

Finally, we should point out that the four cases cited by Olson Towboat really support plaintiff because most of the indicia of corporate presence found in those cases are totally absent in the case at bar.

In *United States* v. *Cia Naviera Continental S.A.* (S.D. N.Y., 1959) 178 F. Supp. 561 the foreign corporation not only had its vessels berthed and repaired in the District but the very contract sued upon was

executed in the district by a disclosed corporate agent. Not so here.

In *D/SA/S Flint* v. *Sabre Shipping Corporation*, (E.D. N.Y., 1964) 228 F. Supp. 384 the foreign corporation frequently loaded and discharged its vessels as well as maintained a claims office in the district. Not so here.

In *Seawind Compania S.A.* v. *Crescent Line, Inc.*, (2 Cir., 1963) 320 F.2d 580 the foreign corporation kept corporate books and records and had an officer regularly present in the District, and, of more importance, had executed and breached in the district the very contract sued upon. Not so here.

In *Federazione Italina D.C.A.* v. *Mandask Compania D.V.*, (S.D. N.Y., 1957) 158 F. Supp. 107 the foreign corporation maintained a bank account, conducted correspondence and had a corporate officer regularly present in the district. Not so here.

Had the District Court made a finding that Olson Towboat was corporately present in Oregon it would have been a clearly erroneous finding for lack of evidentiary support.

NOT FOUND—Plaintiff's "due diligence"

The critical issue here is whether or not the standard for measuring the conduct of plaintiff required it to have inquired of either San Francisco attorney Holmes or the Oliver J. Olson & Co. agent at Coos Bay in order to learn if Olson Towboat had an agent

in Oregon before attaching the VIRGINIA PHILLIPS. Did "due diligence" on part of plaintiff require a plaintiff to turn over every possible stone in its search for an Olson Towboat agent even though to do so would very probably mean "spooking" the tugs and defeating the writ?

On this second prong of the "not found" inquiry, unlike the first, plaintiff's conduct must be measured by what plaintiff knew or should have known; not what might appear later to have been the facts. Also, on this second prong, and unlike the first, this Court is reviewing an error of law and not an error of fact. The reason an error of law is involved is that the essential facts as presented in the Rohde (Tr. 37) and Holmes (Tr. 42) affidavits are not in dispute. What is in dispute is the legal standard upon which those facts were measured by the District Court when dissolving the writ. Such legal standard is reviewable without regard to the clearly erroneous rule. *Seawind Compania, S.A.* v. *Crescent Line, Inc.*, (2 Cir., 1963) 320 F.2d 580, 581. As this Court recognized in *Pacific Tow Boat Co.* v. *States Marine Corp.*, (9 Cir., 1960) 276 F.2d 745 the fixing of the pre-determined standard upon which to test facts is a jural act and hence a conclusion of law is required.

"Due diligence" is a general tort concept which cannot take on any meaning until viewed in the context of the facts to which it is to be applied. For example, had a reasonably prudent person been searching for Olson Towboat to give it an inheritance he

would obviously have injuired of its related Oliver J. Olson & Co. Would that same reasonably prudent person, seeking to secure unequivocal jurisdiction over Olson Towboat in a $240,000 bridge damage action and who was mindful of the ability of Olson Towboat to keep its tugs out of Oregon waters if warned of the intended action go so far as to inquire either of San Francisco attorney Holmes or the Oliver J. Olson & Co. agent in Coos Bay of the whereabouts of such an agent prior to attachment? We think not. Furthermore, any standard, whether described as "due diligence" or as "bad faith" which would call for such conduct prior to employing the writ of foreign attachment would be unreasonable and destructive of the intended use of the writ. It is likewise unreasonable, though for a different reason, to have required plaintiff in Salem, Oregon, to have canvassed the Oregon coastline and depended upon gossip to find out the existence or whereabouts of an Olson Towboat agent. The conjecture of Thomas E. Miller in his affidavit that he believed his identity would have become known if such inquiry had been made is of no probative value whatsoever.

It seems to us that the correct standard for measuring plaintiff's pre-attachment conduct requires some measure of "bad faith" before it qualifies to strike down a writ of foreign attachment. This is even seen in the cases which speak of "due diligence" as being the measuring stick. For example, consider *Seawind Compania S.A.* v. *Crescent Line, Inc.*, (2 Cir., 1963) 320 F.2d 580 as cited by Olson Towboat.

In that case the plaintiff claimed it could not find the defendant when it sued upon a contract which was signed in the district by the defendant's agent. Under such a situation it was obviously bad faith for a plaintiff not to have served the very agent which had signed the contract irrespective of whether or not the foreign corporation had changed its name.

Likewise, in *Federazione Italiana S.C.A.* v. *Mandask Compania D.V.*, (S.D. N.Y., 1957) 158 F. Supp. 107, the plaintiff knew of the presence of a corporate officer but did not tell the U. S. Marshal to look him up. In this case plaintiff did not even know Olson Towboat was involved in the collision until Attorney Holmes on the telephone from San Francisco told plaintiff's Chief Counsel that Captain May was employed by Olson Towboat and not Oliver J. Olson & Co.

In discussing the standard with which to adjudge a person's conduct in using a writ we are brought again to *Cocotas Steamship Co.* v. *Sociedad Maritime Victoria* (S.D. N.Y., 1956) 146 F. Supp. 540, 542 where it was held that nothing short of "improper practice or a manifest want of equity" is sufficient to defeat a writ of foreign attachment. Upon rereading this case we find a footnote indicating such standard was based upon a local court Admiralty Rule 21. We know of no similar local rule in the Oregon District. It is plaintiff's contention that the local rule of the Southern District of New York merely expressed what has long been the custom and practice of the admiralty bar in Oregon and elsewhere.

The maritime law with its ancient writ of foreign attachment has been too long steeped in practicality to permit the lawful use of the writ to hang upon the delicate balance of an admiralty lawyer's careful judgment versus careless judgment. This should be so because the dual purpose of the writ—insuring an appearance and obtaining security, immediately imposes upon the practitioner the mixed duty of having to look but hoping not to find. Furthermore, implicit in any order dissolving a writ is abuse of process. From abuse of process stems wrongful attachment which, in order to be actionable, requires both lack of probable cause and presence of intent to act primarily for an ulterior purpose, *Restatement, Torts*, Vol. III, Section 677. Nothing of this sort is present in this case. Plaintiff did not know of an Olson Towboat agent and although it made what it regarded to be reasonable inquiry it found no agent. That should have ended the matter.

Plaintiff does not accuse Attorney Holmes of bad faith just as Olson Towboat does not accuse plaintiff of bad faith. Our point is that his innocently made representation of the two corporations being separate and distinct of necessity implied that its officers and personnel were likewise separate and distinct. This representation had the effect of negativing any thought that the Coos Bay manager of Oliver J. Olson & Co. was also the manager of Olson Towboat. This representation should be viewed with the fact that plaintiff's search had revealed that Oliver J. Olson & Co. was shown in telephone directories as

having offices in Coos Bay and Portland, while Olson Towboat was not. The only belief that could be formed was that Olson Towboat was a San Francisco based tugboat company which brought its tugs into Oregon waters only fleetingly, if at all.

Olson Towboat argues in its brief that plaintiff ignored an opportunity to make inquiry of Mr. Holmes when he telephoned from San Francisco. Inquiry of the existence or whereabouts of an Olson Towboat agent to receive process was not made for much the same obvious reason that the information was not volunteered. Mr. Holmes was bent on persuading plaintiff that the Olson corporations were not involved in the collision (Tr. 42, Letter Oct. 12, 1966). He did not want to suggest they be named as defendants in potential litigation let alone volunteer an appearance. Plaintiff, on the other hand, very prudently wished to secure unequivocal jurisdiction over these corporations. A discussion of intended action could only have resulted in Olson Towboat keeping its tugs out of Oregon, if as believed it was not doing business in Oregon. There was nothing sinister about the conduct of either Attorney George E. Rohde or Attorney Samual L. Holmes in the San Francisco to Salem telephone conversation. Nor was there anything sinister about plaintiff wishing to use the writ of foreign attachment to accomplish both the appearance of Olson Towboat and the security of its tug VIRGINIA PHILLIPS. *Swift & Company Packers* v. *Campagnia Del Caribe* (1950) 339 U.S. 684.

However, with Attorney Holmes having injected himself into the normal routine of plaintiff undertaking to find Olson Towboat in Oregon, we say, as did Judge Sugarman in *Cocotos S. S. Panama* v. *Sociedad Maritime Victoria,* (S.D. N.Y., 1956) 146 F. Supp. 540 in respect to the "Maria" motion at page 543:

> ". . . it ill behooves Maria to now attempt to escape the natural consequences of its omissions and silence."

Until the Olson Towboat brief was received, plaintiff's counsel did not realize that the U. S. Marshal had not included a "not found" with his return or that the original affidavit for attachment had included a double negative. These matters were never raised upon oral argument. In any event, lack of a "not found" can be easily corrected on remand. *Swift & Company Packers* v. *Compagnia Del Caribe,* (1950) 339 U.S. 684; *International Grain Co.* v. *Dell,* 13 F. Cas. 76, No. 7,053, and technical niceties are not permitted to defeat a writ of foreign attachment, *Esso Standard (Switzerland)* v. *The AROSA SUN,* (S.D. N.Y., 1960) 184 F. Supp. 124.

Plaintiff's ALTER EGO allegation was a contention and not an admission of fact.

When plaintiff alleged an *alter ego* relationship between the two Olson corporations in order to fix liability upon Oliver J. Olson & Co. for the conduct of Captain Charles May, plaintiff was not making an admission of fact adverse to itself but rather charging defendant with having a corporate relationship

which, if later proven, would be adverse to defendants. The allegation did not prove the fact any more than it proved plaintiff's knowledge of the fact.

Prior to the attachment Attorney Holmes had told plaintiff that the two Olson corporations were separate and distinct companies (Tr. 37, 42). While hoping later to prove otherwise, plaintiff had a right to rely upon such representation of Mr. Holmes for purpose of the writ. This was not a situation where plaintiff was alleging its own *alter ego* relationship with another but rather one where it was claiming that two defendant corporations to which it was an utter stranger were so related in their operations that one should be considered as the other. Only by alleging *alter ego* could plaintiff have litigated this legitimate issue and only by the attachment could plaintiff have brought in Olson Towboat in order to litigate it.

It would have been unreasonable for plaintiff's right to a writ to hang or fall upon its ability to prove its allegation of *alter ego* because such allegation involved only one facet of the case. Furthermore, proof of *alter ego* in a case, as here, where the plaintiff is victim of a tort rather than a fraud arising from direct dealings is almost an impossible burden of proof, *Petition of Charles Zubik & Sons*, (3 Cir., 1967) 384 F.2d 267, 273. What would have occurred had Olson Towboat admitted the *alter ego* allegation was never reached because Olson Towboat denied *alter ego* by proving in the Olson affidavit that the two corporations were separate (Tr. 26).

Plaintiff's allegation of *alter ego* was as much a claim of a fact as distinguished from an admission of fact as was the *alter ego* (and fraudulent transfer) allegation made by plaintiff in *Swift & Company Packers* v. *Compagnia Del Caribe*, (1950) 399 U.S. 684. In that case a vessel which was owned by Transmaritima at the commencement of a voyage was found transferred and owned by Del Caribe when she was attached in the Panama Canal Zone. Validity of the attachment depended upon plaintiff either proving that Del Caribe was the *alter ego* of Transmaritima or that the vessel had been fraudulently transferred. Defendants had denied both allegations. The Supreme Court granted a new hearing to plaintiff to permit it to prove, if it could, its *alter ego* (or fraudulent transfer) allegations. Had these allegations been accepted as fact the lower court could not have dissolved the writ as it did. In the case at bar the only one endeavoring to blow both hot and cold is Olson Towboat in contending that plaintiff had knowledge of a fact which Olson Towboat proved to be non-existing.

The very cases cited by Olson Towboat establish our point. In *United States* v. *Buffalo Weaving Co.*, (S.D.N.Y., 1956) 155 F. Supp. 454 process was quashed only after the *alter ego* relationship of two corporations was litigated and established as a fact. The case of *Frank McCleary Cattle Co.* v. *Sewell*, (1957), 73 Nev. 279, 317 P.2d 957 was very much like *Swift & Company Packers* v. *Compagnia Del Caribe*, supra, in that an execution was permitted to

remain on property owned by a corporation other than the defendant because after hearing and upon proof an *alter ego* relationship was found to exist.

Oregon's "long arm", ORS 14.035 has nothing to do with this case.

There is no merit in the contention that because plaintiff might have acquired *personam* jurisdiction over Olson Towboat by serving that corporation in San Francisco under Oregon Revised Statute 14.035 that it had no right to employ the admiralty writ of foreign attachment to accomplish the same purpose.

The first reason is that sub-paragraph "(4)" to ORS 14.035 provides that nothing contained in the statute shall limit or affect the right to serve any person in any other manner now or hereafter provided by law.

The second reason is that the admiralty writ of foreign attachment is not effected by state law. *San Rafael Compania Naveira, S.A.* v. *American Smelt. & R. Co.*, (9 Cir., 1964) 327 F.2d 581; *Bjolstad* v. *Pac. Coast S.S. Co.*, (N.D. Calif., 1914) 221 F. 692. Permitting a state to tamper with maritime law in such a way as to destroy its harmony and uniformity is constitutionally forbidden. *Southern Pacific Co.* v. *Jensen.* (1917) 244 U.S. 206.

CONCLUSION

The order of the District Court in dissolving the writ of foreign attachment was clearly an unlawful exercise or an abuse of discretion and should be reversed because:

1. Olson Towboat was not corporately present in Oregon.

2. Due diligence was employed by plaintiff in its unsuccessful endeavor to find an agent for Olson Towboat in Oregon.

3. The *alter ego* allegation in plaintiff's complaint was a contention of fact and not an admission of fact.

4. Oregon's "long arm," ORS 14.035 has nothing to do with this case.

5. Any lack of a U. S. Marshal's "not found" certificate in his return or any "double negative" in the affidavit for attachment are technicalities to be either cured or ignored upon remand.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Of Attorneys for Appellant